Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

NEERAN ZAIA,

Petitioner,

-vs-

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE SIXTH CIRCUIT INCORRECTLY APPLIED AN ENTRAPMENT ANALYSIS WHICH WAS UNDULY RESTRICTIVE UNDER THIS COURT'S DECISION IN JACOBSON v. UNITED STATES, 112 S.Ct. 1535 (1992), CREATING A SHARP CONFLICT WITH POST-JACOBSON ENTRAPMENT CASES FROM THE SEVENTH AND FIFTH CIRCUITS.

II. WHETHER THE SIXTH CIRCUIT ERRED IN COMPLETELY ABANDONING THE DUE PROCESS-BASED DEFENSE OF OUTRAGEOUS GOVERNMENTAL CONDUCT, WHICH HAS BEEN RECOGNIZED BY THIS COURT AND APPLIED TO THE BENEFIT OF DEFENDANTS IN THE NINTH, TENTH AND THIRD CIRCUITS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner NEERAN ZAIA, through her attorneys, R. STEVEN WHALEN and DONALD C. DOERR, respectfully asks that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The full text of the opinion of the United States Court of Appeals for the

Sixth Circuit, Docket No. 93-1452, released on September 2, 1994, is reproduced in the Appendix, p. 1a.

The judgment of the United States District Court for the Eastern District of Michigan in United States v. Neeran Zaia, No. 92-CR-80137-01-DT, is reproduced in the Appendix, p. 37a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 2, 1994 .

This Court's jurisdiction is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution reads as follows, in pertinent part:

> "No person shall...be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

Petitioner NEERAN ZAIA was tried before a jury in the United States District Court for the Eastern District of Michigan, the Honorable Bernard A. Friedman, presiding, on an indictment charging 12 counts of visa fraud, 18 U.S.C. sec. 1546(a), seven counts of bribery, 18 U.S.C. sec. 201(b)(1), and one count of alien smuggling, 8 U.S.C. sec. 1324(a)(1)(D).[1] The jury convicted her of seven counts of visa fraud, three counts of bribery, and the alien smuggling charge, and acquitted her of the remaining counts.

On March 15, 1993, Petitioner was sentenced to 15 months imprisonment on each count of conviction, to be served concurrently. On September 2, 1994, the United States Court of Appeals for the

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[1] A count of conspiracy to smuggle aliens, 18 U.S.C. sec. 371, was dismissed on the government's motion.

Sixth Circuit affirmed Petitioner's convictions.

The charges against Petitioner arose out of actions she took in late 1991 and early 1992 to help a group of Iraqi refugees flee from Jordan, where they faced persecution in the wake of the Persian Gulf war.

Sue Williams, an American expatriate, testified that she was the owner of Mom's restaurant and hotel in Belize City, Belize, and that she had lived in Belize since 1973. Mom's is located within walking distance of the U.S. Embassy in Belize City, and Williams was acquainted with Rudolph (Rudy) Boone, head of the consular section at the Embassy.

Williams said that in January of 1992, Petitioner came to her hotel seeking lodging for a group of 16 people. They checked in on January 19, 1992, and

stayed about three weeks, until February 12, 1992. Williams said that the group, which included a 3-year-old child and a pregnant woman, mostly stayed around the hotel, and seemed to be angry and frustrated over the time they were spending in Belize, often asking Petitioner when they were going to be leaving. At one point, a fist-fight broke out between two men in the group. Williams said that the group was also getting on her nerves, that she did not want them there, and that she may have asked them to leave at one point.

Sue Williams testified that Rudy Boone called her from the Embassy, and asked her to let him know if she heard anything unusual from the group. Williams testified that about one week later, Petitioner asked her if she knew anyone at the Embassy who could help the group get visas to enter the United States.

According to Williams, Petitioner said that she tried unsuccessfully to get U.S. visas at the Embassy in the Dominican Republic, so she was afraid to go directly to the Embassy in Belize. Williams claimed that Ms. Petitioner said that they could both make a lot of money. Petitioner also told Williams that she had retained the services of a Belizean attorney, Margaret Mousef, to assist the group. Ms. Mousef was the sister of Saaed Mousef, the Deputy Prime Minister of Belize. According to Sue Williams, Petitioner said that if the group could not get U.S. visas, they would return to Santo Domingo.

Rudolph Boone was the U.S. consul at the U.S. Embassy in Belize in 1991 and early 1992. He testified that in January of 1992, following a telephone conversation with Sue Williams, he instructed Ms. Williams to call him if

she heard anything unusual with regard to her Iraqi guests. Prior to this time, and unrelated to the Petitioner, Boone had asked Williams to be an Embassy "Warden," which he characterized as "the eyes and ears of the Embassy," i.e., a civilian who would act as an informant and provide him with whatever she considered suspicious information.

Mr. Boone admitted that even before the group arrived in Belize, he was aware that Petitioner had gone to the U.S. Embassy in the Dominican Republic seeking visas, with World Service Authority passports as identification. He stated that there was nothing illegal about this. A few days before Petitioner and the 16 Iraqis arrived in Belize, Mr. Boone called the Mexican Embassy in Belize and informed them that a group of Iraqis were arriving. He also sent a cable to the State Department in

Washington, D.C. He testified that at the time Petitioner arrived in Belize, he had no information that the Iraqis were attempting to enter the United States illegally. Mr. Boone stated that Petitioner and her group were met at the Belize airport by Margaret Mousef, the sister of the Deputy Prime Minister.

After receiving a call from Sue Williams, Mr. Boone informed the U.S. Ambassador in Belize and the State Department in Washington, after which Agents Robert Valente and Jeffrey Culvert, of the U.S. Diplomatic Security Service, arrived in Belize. It was decided that Mr. Boone would initiate a meeting with Petitioner, and would surreptitiously tape their conversation with a hidden micro-cassette recorder. Boone had no training as a law enforcement officer, and he said that his general instructions from Agents Valente

and Culvert were to find out what the Petitioner's concerns were. He was instructed as to various subterfuges and false statements he might used, but said that his story about being a disgruntled foreign service worker who wanted to open a bakery in Barbados was spontaneous. Mr. Boone testified that he had in his own mind a concept of the "fine line" between a proper and improper overture from Petitioner, and that once she had, in his estimation, crossed that line, he believed he had a "carte blanche" to do certain things he otherwise would not have done.

Mr. Boone first met with Petitioner at Mom's Restaurant on February 5, 1992. He initiated the meeting by arriving unannounced at the restaurant. The tape of that meeting was played for the jury.[2]

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[2] The contents of the tape-recorded conversations between Mr. Boone and Ms. Zaia were not transcribed in the trial

At the meeting, Boone introduced himself, and asked if they could talk a bit. Petitioner asked what it was regarding. Mr. Boone conceded at trial that although he told Petitioner that he was the "chief of the section," he did not immediately identify himself as being connected to the American Embassy. Boone began the conversation as follows:

BOONE: I've gotten word from some people that you're here.

ZAIA: Okay.

BOONE: And I wanted to talk to you about your situation.

ZAIA: Situation? What kind of situation?

BOONE: Can we close the door?...And um, you might need some help and I was wondering what that was. I am the counsel, the chief of the section.

transcript by the court reporter. Rather, the written transcription of the tapes prepared before trial, and provided to the jury, represents the only available transcript. The transcript of the initial meeting of February 5, 1992, is contained in the Appendix, pp. 43a to 83a.

ZAIA: Okay.

BOONE: And ah, that's it.

ZAIA: You mean if I need help, you mean, you can help?

BOONE: With your group, ah--

ZAIA: Well, most of them, they like to stay here. (Appendix, 50a-51a).

Petitioner then talked about her efforts to obtain Belizean "economic citizenship" for the Iraqis, where they would be granted citizenship if they invested in Belize (Appendix, 53a-54a). At trial, Boone testified that this was at one time a program legally offered by Belize, and that he did not advise Petitioner that the program was no longer operative.

At the 2-5-92 meeting, Boone expressed sympathy for the plight of refugees from the Middle East, relating the story of his friend "Tafique," who was, in Boone's words, "a displaced, stateless person." (Appendix, 56a-57a).

Boone continued:

> "But I understand, I think, the Middle East situation and the different way because of Tafique and ah, and he's used to say he was a warrior, you know, he was a Christian and how difficult it is in that part of the world to live because he came from a fine family. His father was a doctor; he was a lawyer, you know. He had to practice law for King Faud in Saudi Arabia for two years, and so, there is this understanding, this feeling.
>
> "So, if I can help you, let me know." (Appendix, 56a-57a)

Petitioner then told Mr. Boone that she was working with a Belizean attorney to try to get visas for her group, and that the lawyer had been in contact with the Mexican embassy (Appendix, 58a). Boone then talked about the great difficulty in getting Mexican visas, and, again bringing up the example of "Tafique," said that there would be a problem without U.S. visas (Appendix, 58a-59a). When Petitioner herself said

that she wanted to help people in the Middle East who wanted to run away because of the war, Mr. Boone intimated that then-President Bush was going to initiate another confrontation with Sadaam Hussein in order to increase his chances of reelection (Appendix, 61a-62a).

At this initial meeting, Petitioner continued to express confusion as to what kind of help Mr. Boone was proposing, and at one point asked if he could help her get Belizean passports for the people in her group (Appendix, 65a-66a). When Mr. Boone asked her to "show some good faith," Petitioner asked, "So what do you want me to show you?" (Appendix, 66a-67a). At this point, Mr. Boone directly asked, "How much is this worth to you," and, when he finally stated that he was from the American Embassy, Petitioner expressed surprise:

BOONE: How much is this worth to you?

ZAIA: I don't know what you gonna do to them. Because I don't know what you're gonna do.

BOONE: Well, if you want visas, if that's what you want-
ZAIA: Visas to where?

BOONE: To the U.S.

ZAIA: You can do to U.S.?

BOONE: Yes.

ZAIA: Oh my God! How long that take?

BOONE: I've gotta do it within the course of the day because if the reconciliation, see; the numbers have to be--it's an easy process. And the thing about why people don't realize how easy it is, is that we don't keep records of the issuances beyond six months.

ZAIA: So you work with the U.S. Embassy?

BOONE: I'm the chief of the section.

ZAIA: Oh, my God!" (Appendix, 68a-69a)

At trial, Mr. Boone conceded that up to this point, there was no indication that Petitioner was seeking access to the

United States for the group of Iraqis.

Mr. Boone then suggested that Petitioner pay him $300 per visa, and Petitioner agreed (Appendix, 71a). He testified that when he asked for this money, he knew that Petitioner had already tried to get U.S. visas legitimately in the Dominican Republic. Boone asked that he be given two of the Iraqi passports to start, and that he would call her later that evening (Appendix, 73a-74a). He concluded the conversation by complimenting Petitioner on her English (Appendix, 82a).[3]

Mr. Boone testified that on February 5, 1992, Petitioner gave him four Iraqi passports. These passports related to the following exhibit numbers, persons and counts in the indictment:

Govt. Ex. 1: Shahin Aram (Count I)

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[3] Ms. Zaia is a naturalized U.S. citizen. English is not her first language.

Govt. Ex. 2: Azhar Mikha (Count II)

Govt. Ex. 3: Faris Yousif(Count III)

Govt. Ex. 4: Shatha Ayoob(Count IV)

Each exhibit had a U.S. nonimmigrant visa stamped in it; Boone testified that he issued the visas fraudulently, with the consent of Agents Valente and Culvert. Government Exhibit 3, Shatha Ayoob's passport, also contained a visa for her child, Taif. Count V of the indictment charged the fraudulent procurement of Taif's visa.

Mr. Boone testified that on February 5, 1992, Petitioner also gave him the equivalent of $450 U.S. as payment for the Mikha and Aram visas. (This money formed the basis of the bribery allegation in Count XIII of the indictment, of which Petitioner was found not guilty). He said that he talked to Petitioner about getting a total of 12 visas for the group.

Mr. Boone and Petitioner met six more times in Belize, between February 6 and February 11, 1992. At the first meeting on February 6th, Boone received the equivalent of $150 U.S., and at the second meeting on February 6th, he received an additional $100. (These funds formed the basis of the bribery charges in Counts XIV and XV of the indictment, of which Petitioner was acquitted). At this second meeting on February 6th, Boone refused to accept a traveller's check, and threatened to stop the issuance of the visas for the remaining refugees.

On February 7, 1992, Boone gave the Petitioner the passports of Yousif and Ayoob, stamped with U.S. visas. They next met on February 10, 1992, at which time Petitioner gave Boone the equivalent of $500 U.S., in payment for the visas for Yousif and Ayoob. (This money formed the

basis of Count XVI, of which Petitioner was acquitted). At that time, Boone said, they talked about obtaining seven more visas for a total price of $3,000 U.S. On February 10th, Mr. Boone testified, Petitioner gave him three more Iraqi passports:

Govt. Ex. 6: Kovay Aywan (Count VI)

Govt. Ex. 7: Meisheil Antoon (Count VII)

Govt. Ex. 8: Maram Zaia (Count VIII)

Boone testified that he stamped fraudulent U.S. visas in these passports.

Mr. Boone testified that he and Petitioner next met on February 11, 1992, at which time Petitioner gave him three passports and an affidavit in lieu of a lost passport:

Govt. Ex. 9: Ghosan Jarjin (Count IX)

Govt. Ex. 10: Nebras Daewood (Count X)

Govt. Ex. 11: Sarmad Marogy

(Count XI)

Govt. Ex. 12: Hisham Mansour
(Count XII)

Petitioner at this time gave Mr. Boone $1,000 in Belizean currency ($500 U.S.), which formed the basis of Count XVII. At a second meeting on February 11, 1992, Petitioner tendered $4,900 in Belizean currency. (This money formed the basis of the bribery charge in Count XVIII). At that time, Mr. Boone returned Government Exhibits 9 through 12 to Petitioner.

Charles Shepler, a U.S. Immigration Officer, was on duty at the New Orleans airport on February 12, 1992. He testified that around noon, he questioned Petitioner, who had arrived at the airport with a group of six Iraqi citizens. He said that the Iraqis had round-trip tickets from Belize, and their nonimmigrant U.S. visas were dated February 12, 1992. He said that

Petitioner's name had come up on his computer, with instructions to contact a joint federal task force. After doing so, Mr. Shepler was contacted by Immigration agent Timothy Houghteling in Detroit, who advised him that they were trying to establish a criminal case against Petitioner, and instructed him to admit the Iraqis into the U.S.

James P. Ennis, an agent with the U.S. Department of Diplomatic Security, was stationed at the U.S. Embassy in Santo Domingo, the Dominican Republic, on October 30, 1991. On that day, Petitioner came to the Embassy to request transit visas for a group of Iraqis, which would enable the group to fly to the Miami, and then transfer to a plane to Acapulco, Mexico. Petitioner identified herself with a valid U.S. passport, and presented 18 World Service Authority passports for the Iraqis, which contained photographs

and identifying information for everyone in her group. Mr. Ennis testified that the visas were not granted, and that the following day, Petitioner returned to the Embassy to pick up the passports. According to Ennis, Petitioner stated that if she could not get U.S. transit visas from the Embassy, she would contact Mexican officials.

George Charles Lannon was employed at the visa services section at the U.S. State Department. He explained that the World Service Authority (WSA) is an international group which believes in world citizenship, and which issues passports to people who subscribe to its beliefs. He said the United States will not issue visas based on WSA passports, but that some countries might.

Mr. Lannon testified that in late 1990 or early 1991, the U.S. Embassy in Iraq closed operations, and that during

the Gulf War, papers at the U.S. Embassy in Baghdad were destroyed. Therefore, he said, it would be very difficult for an Iraqi refugee in Jordan to get a visa from the U.S. Embassy in Amman, Jordan without documentation other than an Iraqi passport.

Robert Valente was an agent with the Diplomatic Security Service, a branch of the U.S. State Department which conducts criminal investigations. He testified that around January 30, 1992, he received a diplomatic cable from the U.S. Embassy in Belize that Petitioner was there with a group of about 12 Iraqis. Mr. Valente arrived in Belize on February 4, 1992, and recruited Chief Consul Rudolph Boone to initiate a meeting with Petitioner, and to surreptitiously record the conversation. He told Boone to treat the meeting as a "normal consular matter," and to leave the meeting open-ended, so

that he could assess the situation. Subsequent meetings between Mr. Boone and Petitioner were also taped, although during the second meeting on February 5, 1992, the tape recorder was inadvertently shut off.

Before he set up the first meeting, Agent Valente told Mr. Boone that the whole situation with the Iraqis could be an innocent misunderstanding, or that it could be a case of a U.S. citizen with a legitimate problem. He told Boone that the situation might change if Petitioner made illegal overtures, but that he (Valente) would assess the situation after the first meeting. Agent Valente testified that when he arrived in Belize, he was aware of the following facts: (1) that Petitioner was a U.S. citizen, legally in Belize with a valid passport and Belizean visa; (2) she had presented herself to the U.S. Embassy in Santo

Domingo, and properly identified herself; (3) in Santo Domingo, she legally applied for visas for the group of Iraqis, who were all identified by documentation provided to the Embassy; and (4) Petitioner informed the consular official in Santo Domingo that if she could not get U.S. transit visas for the Iraqis, she would try to get them Mexican visas.

Agent Valente testified that after the first meeting with Petitioner on February 5, 1992, he decided to have Mr. Boone issue the visas to the Iraqis in multiple groups, rather than doing all 12 at the same time. He said that he, not Mr. Boone, decided how many separate transactions there would be.

Agent Valente testified that the Iraqis who were admitted into the United States pursuant to his plan were all decent, educated people who posed no threat to American security or to the

interests of the American people, and that it was more important to him to arrest Petitioner than to prevent these 12 people from entering the United States.

Several of the Iraqi refugees, who were all Chaldean Catholics, testified that circumstances in the Middle East were such that, even after they fled to Jordan, they were pursued by agents of Sadaam Hussein's government. They testified that Petitioner met them in Amman, Jordan, and arranged for their travel to the Dominican Republic. Their understanding was that Petitioner would try to get them visas to stay in Mexico, not the United States. The refugees also testified about the difficulties they encountered after arriving in the Dominican Republic.

The testimony of Faris J. Yousif was representative of the refugee's stories.

Mr. Yousif testified that he left Iraq in July of 1991, with his wife and 8-month-old son, and went to Amman, Jordan. He testified that he was in trouble in Iraq because he was called into the army, and refused orders to invade Kuwait. He said that it was very bad for him and his family in Iraq, and that the Iraqi government had registered his son for military service, even though his son was only an infant.

Mr. Yousif testified that he wanted to leave Jordan because it was not safe there for him and his family, owing to the good relations between the government of Sadaam Hussein and the Jordanian government. In Jordan, he worried about Iraqi spies. He hid at his brother's house in Jordan, because Iraqi agents were looking for him. He found out later that his brother was killed in Iraq.

In October of 1991, Mr. Yousif met

Petitioner at a tour agency in Amman, and arranged to leave the country with the group of 16 Iraqis, which included seven young girls and boys, his own infant son, and a pregnant woman. They flew to the Dominican Republic, where they stayed for two months. During this time, Petitioner was trying to arrange for Mexican visas for the group. As time was running out on their Dominican Republic visas, they went to Nicaragua in December of 1991. Petitioner told them that it might be easier to get Mexican visas in Nicaragua. However, the Nicaraguans refused them entry, and sent them to Guatemala. The Guatemalan officials threatened to send them back to Iraq. Mr. Yousif said that in Nicaragua, the officials tried to extort money from them.

While the group was being detained at the airport in Guatemala, Hazim Saeegh arrived, and contacted a representative

of the United Nations High Commission on Refugees in Guatemala. The U.N. representative told the Guatemalan officials that the Iraqis were refugees, and that they were sentencing them to death if they sent the group back to Iraq.

The group was permitted to return to the Dominican Republic, where Mr. Saeegh arranged for a U.N. representative from Venezuela to talk to them. They were under guard in the Dominican Republic, and Petitioner and Mr. Saeegh, along with a lawyer, tried to get them visas to stay there. The Dominican government gave them 10 days to resolve the situation, or they would be deported to Iraq. Petitioner and Mr. Saeegh met with a representative of the President of the Dominican Republic, and obtained an extension on their visas.

After obtaining additional documentation which they understood the

Nicaraguans to have demanded, the group returned to Nicaragua a second time, but were again refused entry. From Nicaragua, they went to Belize, being admitted to the country on Belizean visas which Petitioner had obtained for them. Mr. Yousif said that the group had a deadline by which they had to leave Belize, or be sent back to Iraq. During this time, Petitioner went to Mexico to try to arrange for Mexican visas. Mr. Yousif testified that he stayed in Belize for about three weeks, and then flew to Houston, with a U.S. visa which Petitioner had arranged for him.

Father Jaques Yasso, the pastor of Sacred Heart Church, a Chaldean Catholic Church in the Detroit area, described the terrible conditions that Chaldean Catholics faced in Iraq since the Ba'ath Party took over in 1968, and how conditions had worsened since the Iran-

Iraq war. He said that he encouraged Petitioner to help Iraqi refugees in other parts of the world.

Father Doma Behanan, also a Chaldean Catholic priest, testified that he often referred members of his parish to Petitioner for assistance.

The District Court judge sentenced Petitioner to 15 months imprisonment, the lowest sentence possible under the guidelines as he scored them. The judge stated that this was "the toughest case I've had as a judge, in terms of sentencing," and noted that Petitioner did some good, as the people she helped were in substantial jeopardy. He stated that the Iraqi witnesses would have been killed if they had not left Iraq. In denying a defense motion for a downward departure from the guidelines based on sec. 5K2.11, the judge said that Petitioner did indeed prevent a "greater

harm" to the 16 refugees, but that this did not fit into a 5K2.11 departure. The judge added that he would impose a lesser sentence if he could:

> "If I were free to fashion a sentence which I thought was appropriate in this particular matter, the record should clearly reflect it would not be the minimum under the sentencing guideline, but I'm just not free to do that."

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT INCORRECTLY APPLIED THIS COURT'S DECISION IN JACOBSON v. UNITED STATES, AND IS IN CLEAR CONFLICT WITH THE SEVENTH AND FIFTH CIRCUITS REGARDING THE SCOPE OF THE ENTRAPMENT DEFENSE.

The defense in this case was entrapment. Petitioner argued in both the District Court and the Sixth Circuit that the prosecution failed to present sufficient evidence to show beyond a reasonable doubt that she was not entrapped by the actions of U.S. Consul

Rudolph Boone.[4]

The viability of this entrapment issue depends upon the interpretation of this Court's decision in Jacobson v. United States.[5] In this regard, the Sixth Circuit's opinion, which relied on United States v. Kussmaul[6], is in conflict with the Seventh Circuit's en banc decision in United States v. Hollingsworth[7] and the Fifth Circuit's decision in United States

[4] In reviewing a sufficiency of the evidence challenge, the Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier-of-fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Where evidence is presented which would support a defense of entrapment, the government is required to prove lack of entrapment beyond a reasonable doubt. Jacobson v. United Sates, 112 S.Ct. 1535, 1540 (1992).

[5] 112 S.Ct. 1535 (1992).

[6] 987 F.2d 345 (6th Cir. 1993).

[7] 27 F.3d 1196 (7th Cir. 1994).

v. Sandoval.[8] This conflict among the Circuits suggests a need for this Court to clarify its decision in Jacobson.

The nature of the conflict is most clearly shown by the Seventh Circuit's decision in United States v. Hollingsworth, which is itself a closely divided (six to five) en banc opinion.[9] Writing for the majority, Chief Judge Posner first noted that historically, the defense of entrapment encompassed two elements: inducement and predisposition.[10] He then stated that Jacobson "changed the landscape of the entrapment defense," Hollingsworth, 27 F.3d at 1198, by refining the meaning of predisposition. The majority stated:

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[8] 20 F.3d 134 (5th Cir. 1994).

[9] The vote in Jacobson was also close (five to four, with Justice White writing the majority opinion).

[10] See Matthews v. United States, 485 U.S. 58, 62-63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988).

"[T]he [Jacobson] Court clarified the meaning of predisposition. Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force. The dictionary definitions of the word include `tendency' as well as `inclination.' The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation. A public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales. For these and other traditional targets of stings all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity."

(Emphasis added).

In Hollingsworth, the defendants

were a farmer and a dentist who decided to become international financiers, "a vocation for which neither had any training, contacts, aptitude, or experience." 27 F.3d at 1200. Losing money, they advertised the sale of their Grenadan banking license. Seeing the advertisement in USA Today, a U.S. customs agent contacted the defendants, and, adopting an undercover persona, induced them to help him in a money laundering scheme.

Applying the above interpretation of Jacobson, the Seventh Circuit majority held that the Hollingsworth defendants were entrapped because, although they readily accepted the government agent's offer to launder money, they were never in a position to break the law before the government's intervention. In other words, they may have had the "pure mental state" to break the law, but they "had no

prayer of becoming money launderers without the government's aid." 27 F.3d at 1202.

There were three separate dissenting opinions in Hollingsworth. Judge Ripple, in whose opinion four other judges joined, wrote that the majority interpreted Jacobson as creating a new element for the entrapment defense: readiness to commit the crime, as distinguished from mere willingness.[11] Judge Easterbrook described the analytical schism between majority and dissent this way:

> "After all, what six judges of this court see in Jacobson, five others think a mirage. As we approach a thousand judges on the federal courts, such differences in visual acuity

[11] "Clarifying the position of the majority, the court now asserts that Jacobson significantly changed the law of entrapment and changed it in a way that necessitates the introduction of their new concept of `readiness' into entrapment analysis." 27 F.3d at 1216 (dissenting opinion, of Ripple, J.).

have the potential to transmute Norman Rockwell's view of the world into Joan Miró's." 27 F.3d at 1212 (dissenting opinion of Easterbrook, J.).

Judge Ripple's dissent cited the Sixth Circuit decision in United States v. Kussmaul, supra, on which the Sixth Circuit panel in the present case relied. In the present case, the Sixth Circuit noted the conflict between itself and the Seventh Circuit as to how Jacobson is to be applied, and approved the Hollingsworth dissent:

> "Hollingsworth relies upon Jacobson to support the distinction between a defendant's being `willing' to commit a crime, meaning that she desires the outcome of the imagined illegal act, and her being `ready' to commit that crime, meaning that she is prepared to take the steps necessary to complete the actual crime. 9 F.3d at 598-99. The case law in our circuit, however, is more in line with the Hollingsworth dissent's reliance upon Jacobson for the proposition that `predisposition is demonstrated by the defendant's ready commission of [a] criminal act.'"

Neither Kussmaul nor the dissent in Hollingsworth, however, acknowledges the following language in Jacobson:

> "Petitioner's ready response to these solicitations cannot be enough to establish beyond reasonable doubt that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails." 112 S.Ct. at 1543.

Thus, contrary to the interpretation of Kussmaul and the Hollingsworth dissent, Jacobson does not presume predisposition from the alacrity with which a defendant accepts the government's invitation to crime. If it did, then this Court would have rejected Mr. Jacobson's defense.[12] In this regard, the conflict between the Sixth and Seventh Circuits is manifest, as is the conflict between the Sixth Circuit and this Court's decision in

[12] Indeed, Justice O'Connor made this point in her dissenting opinion in Jacobson, 112 S.Ct at 1543 (dissenting opinion of Justice O'Connor).

Jacobson.

The Fifth Circuit in United States v. Sandoval[13] applied Jacobson in reversing a bribery conviction in which the facts were strikingly similar to those of Petitioner's case. In Sandoval, the defendant inquired of an Internal Revenue Service agent regarding the agency's reward program for information on tax evaders. The I.R.S. was reassessing the 1988 tax liability of the defendant and his wife, and the agent believed that the defendant might be trying to solicit a bribe. The agent set up a meeting with the defendant, in which she hinted that she would be interested in a bribe. Although the defendant initially expressed interest only in the reward program, the agent continued to push the idea of a bribe, asking, "What's

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[13] 20 F.3d 134 (5th Cir. 1994).

in it for me,"[14] and impressing the defendant with the risks she was taking. At the conclusion of the meeting, the defendant agreed to pay a bribe of $3,000.

As in Petitioner's case, the government in Sandoval initiated the bribery scheme. The Fifth Circuit found that the agent "play[ed] on [defendant's] weaknesses and pressure[d] him into accepting the scheme." 20 F.3d at 137. Significantly, the court found that the fact that the defendant agreed to the scheme after a single meeting, as opposed to the 26 months of government activity in Jacobson, was not determinative of the predisposition question: "The time involved is less important than the degree of pressure applied." 20 F.3d at 138.

[14] These were the exact words used by Rudolph Boone in Petitioner's case.

Sandoval cannot be reconciled with the Sixth Circuit's ruling in Petitioner's case. While the Sandoval analysis is not as detailed as Hollingsworth, it seems clear that the Fifth Circuit, as well as the Seventh Circuit, would have reversed Petitioner's conviction on the basis of United States v. Jacobson.

Under Jacobson, as applied by Hollingsworth and Sandoval, there was insufficient proof that Petitioner was predisposed, i.e., ready and willing, to commit the crimes of visa fraud, bribery and alien smuggling prior to the inducement offered by U.S. Consul Rudy Boone. In addition, given the life and death situation facing the 16 Iraqis, the government's inducement to commit these crimes was so strong as to be virtually irresistible to Petitioner or to anyone else in her position. As the

Hollingsworth majority stated, "[I]nducement is significant chiefly as evidence bearing on predisposition: the greater the inducement, the weaker the inference that in yielding to it the defendant demonstrated that he was predisposed to commit the crime." 27 F.3d at 1200.

Petitioner's lack of independent predisposition to commit the crimes with which she was charged is evidenced by her conduct prior to her contact with Mr. Boone. That conduct was legal, as acknowledged by Agent Valente. Petitioner attempted to get transit visas from the U.S. Embassy in Santo Domingo, worked with Mexican, Dominican Republic and United Nations officials, and retained attorneys in Belize and the Dominican Republic.[15]

[15] In footnote 4 of its opinion in the present case, the Sixth Circuit refers to a government allegation of "the

No doubt Petitioner was extremely anxious to make sure that her group was not sent back to the Middle East, where they faced dire consequences. However, as was the case in Jacobson v. United States, supra, 112 S.Ct. at 1541, she had acted within the law at the time she was

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attempt to bribe a Guatemalan immigration official prior to arriving in Belize." Appendix, p. 15a. In fact, there was no substantive evidence of this allegation at trial. The government questioned Rudolph Boone on redirect examination regarding a diplomatic cable he allegedly received which referred to an attempt to bribe a Guatemalan official. The defense objected and moved for a mistrial. At a colloquy outside the hearing of the jury, the government conceded that the document was hearsay, proffering it not to show the truth of the allegations therein, but to show why Mr. Boone took certain subsequent actions. The trial judge refused the government's request to read the cable into the record and, although he denied a mistrial, gave the jury a cautionary instruction on similar acts evidence at the conclusion of the case. In short, this cable contained multiple levels of hearsay, was not shown to be reliable, and was not admitted as substantive evidence. (The objected-to testimony and the colloquy are found in the trial transcript of 12-7-92, pp. 170-180).

induced by U.S. government officials. As this Court held in Jacobson:

> "We simply conclude that proof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations is not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit the crime charged independent of the Government's coaxing" Id., 112 S.Ct. at 1542, n. 3.

Indeed, Agent Valente testified that when he first arrived in Belize and recruited Rudy Boone to work in an undercover capacity, he told Mr. Boone that the whole situation with the Iraqis could be an innocent misunderstanding, or that it could be a case of a U.S. citizen with a legitimate problem.

Even during the initial part of the February 5, 1992 meeting between Petitioner and Mr. Boone, the Petitioner showed little predisposition to committing the crimes of U.S. visa fraud,

bribery and alien smuggling.[16] Before Boone revealed that he was from the U.S. Embassy and that he could help her get U.S. visas for $300 each, Petitioner stated that her group would either like to stay in Belize or go to Mexico, and even in that context, she asked for nothing illegal. It was Mr. Boone, not Petitioner, who brought up the possibility of getting U.S. visas; it was Mr. Boone, not Petitioner who asked, "What's in it for me;" and it was Mr. Boone, not Petitioner, who suggested the

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[16] The only other evidence of predisposition on which the government relied was the testimony of Sue Williams that Petitioner asked if she knew anyone at the embassy who could help her. It would be a tremendous inferential leap to interpret this statement as expressing interest in bribing an official, as opposed to seeking legitimate help from someone who was acquainted with embassy officials. See United States v. Sandoval, supra. Agent Valente, who was aware of the information from Ms. Williams when he arrived in Belize, conceded that he was not at that point convinced that Ms. Zaia was anything more than an American citizen with a legitimate problem.

amount which should be paid for the visas.

Furthermore, Petitioner's lack of predisposition to bribe a U.S. official in order to obtain fraudulent visas is shown by her surprise when Mr. Boone revealed his position with the U.S. Embassy and his willingness to sell her visas:

> BOONE: How much is this worth to you?
>
> ZAIA: I don't know what you gonna do to them. Because I don't know what you're gonna do.
>
> BOONE: Well, if you want visas, if that's what you want-
> ZAIA: Visas to where?
>
> BOONE: To the U.S.
>
> ZAIA: You can do to U.S.?
>
> BOONE: Yes.
>
> ZAIA: Oh my God! How long that take?
>
> BOONE: I've gotta do it within the course of the day because if the reconciliation, see; the numbers have to be--it's an easy process. And the thing

about why people don't realize how easy it is, is that we don't keep records of the issuances beyond six months.

ZAIA: So you work with the U.S. Embassy?

BOONE: I'm the chief of the section.

ZAIA: Oh, my God!" (Appendix, 68a-69a).

The nature of the inducement offered by the government must be weighed in considering an entrapment defense. United States v. Hollingsworth, supra. In discussing the "inducement" prong of the entrapment in this case, it should first be noted that Mr. Boone, by his own admission, had no training as a law enforcement agent. His instructions from Agent Valente were to simply gather information, and leave the first meeting with Petitioner open-ended. Instead, Mr. Boone developed his own theory of where the "fine line" between innocent and unlawful overtures lay, and granted himself a "carte blanche" to do things he

would not otherwise have done if, in his independent estimation, Petitioner crossed that line. Petitioner was entrapped by an overly zealous amateur who disobeyed the instructions of the agent in charge of the investigation.

Against the factual background of Petitioner trying to find a safe haven for her group of 16 Iraqis, this is what Rudy Boone did:

He approached Petitioner, who had no idea what he wanted, and commiserated about the tragic plight of Iraqi Christians, personalizing the inducement with a poignant story of his refugee friend, "Tafique."

When Petitioner told him that she was trying to make legitimate arrangements with the Mexican government, Mr. Boone discouraged her, telling her how difficult this would be without U.S. visas.

Mr. Boone, again playing on Petitioner's anxiety about the situation in Iraq, suggested that American politics would cause the Middle East situation to flare up again, creating more problems for Iraqi refugees.

It was Mr. Boone, not Petitioner, who solicited a bribe. ("What's in it for me?" and "How much is this worth to you?"

It was Mr. Boone, not Petitioner, who set the amount of the bribe.

It was Mr. Boone, not Petitioner, who structured the time and place of future meetings.

As the Seventh Circuit noted in Hollingsworth, the stronger the inducement, the harder it will generally be for the government to prove that the defendant was independently predisposed to commit the crime. In this case, there was very little predisposition, short of Petitioner's generalized desire to keep

the refugees from being deported, persecuted and possibly killed, and an irresistible inducement offered by Mr. Boone.

Thus, Petitioner was not predisposed to commit the offenses charged prior to contact with Rudy Boone, as required to support a conviction under Jacobson v. United States. Furthermore, under Jacobson, as applied by United States v. Hollingsworth, Petitioner was simply not in a position to commit the crimes charged without government help. Stated differently, but for the creative intervention of Consul Rudolph Boone, Petitioner would not have committed those offenses.

Judge Ripple's dissenting opinion in United States v. Hollingsworth, supra, 27 F.3d at 1219, while misreading the import of Jacobson, does offer a persuasive reason why this Court should grant a writ

of certiorari:

> "This en banc proceeding sharply delineates the differences between the majority and the minority of this court on the issue of entrapment. It presents, in the most stark terms possible, two divergent views of the law of entrapment. More particularly, it presents a square difference of opinion among the judges of this court on the significance of the Supreme Court's opinion in Jacobson. It questions the continued vitality of Russell.The holding of the majority sets this circuit on a doctrinal course different from that of the other circuits. It presents, as the government notes in its petition for rehearing, a significant practical burden for law enforcement authorities. It is now for the Supreme Court to determine whether the doctrinal course that the majority has now set and the burden that it has imposed on law enforcement efforts are correct ones." (Emphasis added).

Petitioner contends that the Seventh Circuit's en banc majority decision in United States v. Hollingsworth, supra, correctly applies the entrapment analysis set forth by this Court in Jacobson v.

United States. Petitioner respectfully asks this Court to grant a Writ of Certiorari to the Sixth Circuit to resolve the conflict among the Circuits.

II. THE SIXTH CIRCUIT HAS COMPLETELY ABANDONED THE DEFENSE OF OUTRAGEOUS GOVERNMENT CONDUCT AS A VIOLATION OF THE DUE PROCESS CLAUSE, PUTTING IT IN CONFLICT WITH OTHER CIRCUITS AND WITH THE SUPREME COURT.

At trial and on appeal, Petitioner asserted that the government's conduct in this case not only constituted entrapment, but was so outrageous that it was a violation of the Due Process Clause.

The outrageous government conduct defense was first described in United States v. Russell, 411 U.S. 423, 431-432, 93 S.Ct. 1637, 1642, 36 L.Ed.2d 366

(1973).[17] In a later plurality decision, Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), the concurring opinion left open the possibility that an outrageous government conduct defense based on the Due Process Clause might be successfully invoked despite the unavailability of the entrapment defense due to predisposition. Id., 425 U.S. at 494-495.[18]

The Ninth, Tenth and Third Circuits have applied the outrageous government conduct/ Due Process analysis in reversing criminal convictions. See

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[17] In Russell, Justice Rehnquist noted that someday the Court might be presented with a situation "in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Id., 411 U.S. at 431-432.

[18] In Hampton, at least six members of the Court in various plurality opinions recognized the potential availability of an outrageous governmental conduct defense regardless of the defendant's predisposition.

United States v. Solorio, ___F.3d___(9th Cir 1994)(No. 93-50507, rel'd 9-20-94); Greene v. United States, 454 F.2d 783 (9th Cir. 1971); United States v. Harris, 997 F.2d 812, 816 (10th Cir. 1993);[19] United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978).

In the present case, the Sixth Circuit ostensibly applied a due process test set forth in United States v. Barger, 931 F.2d 359, 363 (6th Cir. 1991), and found the defense lacking under the facts of this case. However, as the panel noted in footnote 6 of its opinion (see Appendix, p. 23a), the Sixth Circuit in fact held, in United States v. Tucker, 28 F.3d 1420 (6th Cir. 1994), that as a matter of law, the defense of

[19] Harris was an entrapment case. The Tenth Circuit stated in dicta that an alternative ground for reversing the conviction was that the government's conduct approached being sufficiently outrageous to sustain a due process defense.

outrageous government conduct no longer exists. Rather, Tucker held, a defendant who challenges government inducement to crime is limited to the defense of entrapment, with its key element of predisposition.

The facts of this case, particularly the overreaching nature of the government's actions, have been set forth in the preceding argument and in the Statement of the Case. If the defense of outrageous government conduct exists, Petitioner is entitled to its benefit under these facts. She asks this Court to grant a writ of certiorari to the Sixth Circuit to resolve the clear conflict between its opinion in United States v. Tucker and the opinions of the Ninth, Tenth and Third Circuits, which in turn rely on this Court's language in United States v. Russell and Hampton v. United States.

CONCLUSION

WHEREFORE, Petitioner NEERAN ZAIA asks this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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